UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/826,293	04/19/2004	Nir Hadar	620/30	9911

7590 09/17/2008

DR. MARK FRIEDMAN LTD.
C/O BILL POLKINGHORN
DISCOVERY DISPATCH
9003 FLORIN WAY
UPPER MARLBORO, MD 20772

EXAMINER	
HUYNH, LOUIS K	
ART UNIT	PAPER NUMBER
3721	

MAIL DATE	DELIVERY MODE
09/17/2008	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND
TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte NIR HADAR

Appeal 2008-2684
Application 10/826,293
Technology Center 3700

Decided: September 17, 2008

Before MURRIEL E. CRAWFORD, ANTON W. FETTING, and
BIBHU R. MOHANTY, *Administrative Patent Judges*.

MOHANTY, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

The Appellant seeks our review under 35 U.S.C. § 134 of the final rejection of claims 14-18 and 24-27. Claims 1-13 and 19-20 have been

cancelled. Claims 21-23 have been withdrawn. We have jurisdiction under 35 U.S.C. § 6(b) (2002). We REVERSE.

THE INVENTION

The Appellant's claimed invention is directed to a knock down crate with walls stored in the base. The base has an elongated recess which receives the sides of the crate when detached (Spec. 2:19-3:510). Claim 27, reproduced below, is representative of the subject matter of appeal.

> 27. A method for using a knock-down crate to transport produce from a loading location to an unloading location, the method comprising the steps of':
>
> (a) providing a knock-down crate having:
>
> (i) a base having a length, a breadth, and an upper surface that includes an elongated recess, said base including a pair of forklift tine engagement regions extending parallel to said length such that a major part of said recess lies between said forklift tine engagement regions, each of said forklift tine engagement regions configured for receiving tines of a forklift mechanism, and
>
> (ii) four sides deployable in a crate configuration wherein a plurality of said sides are engaged with said base and each other to form a four-sided crate, said four sides being further deployable in a knock-down configuration wherein said four sides are received substantially within said elongated recess;
>
> (b) deploying said crate in said crate configuration;

(c) loading said crate at the loading location with produce, at least part of the produce lying within said elongated recess;

(d) transporting the produce in said crate to the unloading location;

(e) unloading the produce from said crate; and

(f) deploying said crate in said knock-down configuration with said plurality of sides located substantially within said elongated recess for transport to a next loading location.

THE REJECTIONS

The Examiner relies upon the following as evidence in support of the rejections:

Foy	US 4,917,255	Apr. 17, 1990
Luburic	US 5,938,059	Aug. 17, 1999

The following rejections are before us for review:

1. Claims 14-18 and 24-27 are rejected under 35 U.S.C. § 103(a) as unpatentable over Luburic and Foy.

THE ISSUE

The issue is whether the Appellant has shown that the Examiner erred in rejecting the claims 14-18 and 24-27 as being unpatentable over Luburic and Foy. This issue turns on whether Foy discloses the claimed limitation that a "major part of the recess lies *between* the forklift tine engagement regions".

FINDINGS OF FACT

We find the following enumerated findings of fact (FF) are supported at least by a preponderance of the evidence[1]:

FF1. *Webster's New World Dictionary, Third College Edition* (1988), lists the primary definition of "between" as: 1) in or through the space that separates (two things).

FF2. Foy discloses a collapsible container with a recess 20 between the two base sides 14. The recess 20 lies above the elongated channels 44 which also serve as forklift tine engagement regions (Fig. 14).

PRINCIPLES OF LAW

"Section 103 forbids issuance of a patent when 'the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.'" *KSR Int'l Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1734 (2007). The question of obviousness is resolved on the basis of underlying factual determinations including (1) the scope and content of the prior art, (2) any differences between the claimed subject matter and the prior art, (3) the level of skill in the art, and (4) where in evidence, so-called secondary considerations. *Graham v. John Deere Co.*, 383 U.S. 1, 17-18, (1966). *See also KSR*, 127 S.Ct. at 1734 ("While the sequence of these

[1] *See Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1427 (Fed. Cir. 1988) (explaining the general evidentiary standard for proceedings before the Patent Office).

questions might be reordered in any particular case, the [*Graham*] factors continue to define the inquiry that controls.")

ANALYSIS

The Appellant argues that the rejection of the claim 27 under 35 U.S.C. § 103(a) as being unpatentable over Luburic and Foy is improper because the references fail to discloses the claimed limitation that "a major part of the recess lies *between* said forklift tine engagement regions" (Br. 7). The Appellant asserts that is incorrect to apply a non-spatial meaning of the word "between" in interpreting this claim limitation.

In contrast, the Examiner has determined that a major part of the recess in Foy does lie between the forklift tine engagement regions (Ans. 3). The Examiner uses a definition of "between" from Merriam Webster's Collegiate Dictionary, tenth edition, which defines the term "between" to have other meanings such as "in common to" or "serving to connect or unite in a relationship" (Ans. 6).

We agree with the Appellant. We first construe the meaning of the phrase "between said elongated channels" as used by the Appellant in the claims. We determine the scope of the claims in patent applications "not solely on the basis of the claim language, but upon giving claims their broadest reasonable construction 'in light of the specification as it would be interpreted by one of ordinary skill in the art.'" *Phillips v. AWH Corp.*, 415 F.3d 1303, 1316 (Fed. Cir. 2005) (en banc) (*quoting In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004)). The specification describes (Spec. 11:18-12:10) that:

> "Crate 10 is preferably configured for handling by standard pallet handling equipment. To this end, base 12 preferably has a pair of elongated channels 26 extending parallel to length L for receiving tines of a forklift mechanism (forklift, pallet carrier etc.). Channels 26 typically extend along the entirety of length L, allowing insertion of tines from either end of the crate. Most preferably, at least a major portion of recess 20 is located between channels 26. Thus, considered from a different point of view, crate 10 may be considered to have a thin base 12 in the region of recess 20, with locally raised regions to provide the volume required for channels 26. It will thus be understood that the usable volume of the inside of the crate is fully maximized by making all volume other than that required for channels 26 available for loading with produce. Furthermore, since the sides are stored between the regions of base 12 containing channels 26, nothing overlies the regions of the base 12 containing channels 26 in the collapsed state, making the height of the crate in its collapsed state significantly less than that of "fold-down" crates of similar dimensions". (Emphasis added).

The Appellant in the Specification has stated that "since the sides are stored *between* the regions of *base* 12 containing *channels* 26, *nothing overlies the regions of the base 12 containing channels 2*" (Spec. 12:6-8, emphasis added). One of ordinary skill in the art would interpret this use of the word "between" in the specification to mean that regions of the base containing the sides (the recess) are located in or through the space that separated the channels, and to not overlie the channels. This interpretation of the phrase "between" is consistent with the definition provided by Appellant in the Appeal Brief (Br. 8) and our own definition (FF1). For the reasons given by the Appellant, the definition for "between" selected by the Examiner are unreasonable because they apply to meanings outside the context of the claimed subject matter.

Foy discloses a recess that lies "above" the channels (FF2) and not between. Since Foy fails to disclose the claimed limitation for "a major part of the recess to lie between said forklift tine engagement regions (which are channels)" the rejection of claim 27 under 35 U.S.C. § 103(a) as unpatentable over Luburic and Foy is not sustained.

The Appellant's arguments for claims 14-18 and 24-26 are the same as those argued for claim 27. For the above reason, the rejection of claims under 35 U.S.C. § 103(a) as unpatentable over Luburic and Foy is also not sustained.

CONCLUSIONS OF LAW

We conclude that Appellant has shown that the Examiner erred in rejecting claims 14-18 and 24-27 under 35 U.S.C. § 103(a) as being unpatentable over Luburic and Foy

DECISON

The Examiner's rejection of claims 14-18 and 24-27 is not sustained.

REVERSED

vsh

Appeal 2008-2684
Application 10/826,293

DR. MARK FRIEDMAN LTD.
C/O BILL POLKINGHORN
DISCOVERY DISPATCH
9003 FLORIN WAY
UPPER MARLBORO MD 20772